

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JASPER W. BAILEY, G-60744,	)	
	)	
Petitioner,	)	No. C 15-0677 CRB (PR)
	)	
vs.	)	ORDER OF DISMISSAL
	)	
STU SHERMAN, Warden,	)	(Dkt. #1, 7 & 12)
	)	
Respondent.	)	

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I.

Petitioner, a state prisoner incarcerated at the California Substance Abuse Treatment Facility and State Prison, Corcoran, has filed a pro se petition for a writ of habeas corpus challenging: (1) a 2009 conviction and indeterminate life sentence from Santa Clara County Superior Court, and (2) an apparent INS/ICE detainer letter and warrant seeking to commence federal removal proceedings against him after he is released from state custody. Petitioner also seeks to proceed in forma pauperis under 28 U.S.C. § 1915.

II.

Petitioner's habeas challenge of his 2009 conviction and indeterminate life sentence from Santa Clara County Superior Court must be construed as a second or successive petition for a writ of habeas corpus under 28 U.S.C. § 2254. His first petition was denied on the merits on October 8, 2013. See Bailey v. Diaz, No. C 12-1414 CRB (PR) (N.D. Cal. Oct. 8, 2013) (order denying petition for a writ of habeas corpus challenging 2009 state court conviction).

1 A second or successive petition under § 2254 may not be filed in this court  
2 unless the petitioner first obtains from the United States Court of Appeals for the  
3 Ninth Circuit an order authorizing this court to consider the petition. See 28  
4 U.S.C. § 2244(b)(3)(A). Petitioner has not obtained such an order from the Ninth  
5 Circuit. Petitioner's § 2254 habeas challenge to the 2009 state court judgment  
6 accordingly must be dismissed without prejudice to refiling if petitioner obtains  
7 the necessary order from the Ninth Circuit.

8 III.

9 Petitioner's habeas challenge of an apparent INS/ICE detainer letter and  
10 warrant seeking to commence federal removal proceedings against him after he is  
11 released from state custody perhaps may be brought in a petition for a writ of  
12 habeas corpus under 28 U.S.C. § 2241. See INS v. St. Cyr, 533 U.S. 289, 314  
13 (2001) (district courts have habeas jurisdiction under 28 U.S.C. § 2241 to review  
14 final orders of removal on constitutional and statutory grounds, provided that  
15 judicial review is unavailable in the court of appeals). But such a petition would  
16 be premature because petitioner is not yet "subject to a final deportation order"  
17 and therefore is not "in custody" for purposes of § 2241. See Nakaramurack v.  
18 United States, 68 F.3d 290, 293 (9th Cir. 1995) (individuals are in custody for  
19 purposes of § 2241 so long as they are subject to a final deportation order). Even  
20 individuals who are removable, but not yet subject to a removal order, are not in  
21 custody for purposes of § 2241. See Veltmann-Barragan v. Holder, 717 F.3d  
22 1086, 1088 (9th Cir. 2013). Petitioner's habeas challenge of an apparent INS/  
23 ICE detainer letter and warrant seeking to commence federal removal proceedings  
24 against him accordingly must be dismissed without prejudice.

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IV.

For the foregoing reasons, the petition for a writ of habeas corpus is DISMISSED without prejudice. But based solely on petitioner's affidavit of poverty, his motion for leave to proceed in forma pauperis (dkt. #12) is GRANTED.

The clerk shall terminate all pending motions (see dkt. #1 & 7) as moot, enter judgment in accordance with this order and close the file.

SO ORDERED.

DATED: April 24, 2015

  
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CHARLES R. BREYER  
United States District Judge